

The Right Honourable }
Charles Lord Mobun, } APPEL

The Most Noble
James Duke of Hamilton, and Elizabeth
Duchess of Hamilton, his Wife, } RESPOND

The Respondents CASE.

TH E Respondents Filed a Bill in *Chancery* against the Appellant, to demand of him a Pair of Diamond Pendants and Necklace, which was the only Legacy Devise'd to her by Will of her Uncle *Charles Earl of Macklesfield*, Deceas'd: whereof the Appellant was Sole Executor, and had got the Possession; and which had been part of the Jewels of the Lady *Gerrard*, Deceas'd, Mother of the Respondent, the Dutchess.

The Appellant by his Answer Confess'd the Legacy, and himself the Residuary Legatee; but insisted that the same was Left to the Dutchess by the said Earl, Provided that she should give no Trouble to his Executor: and insists, That before the Respondents Inter-marriage, there had been a Deed made between the Respondents and the said Lady *Gerrard*, the Dutchess's Mother and Guardian; whereby the Respondent, the Duke Covenanted within Two Days after the Marriage, to Release to the said Lady *Gerrard* all Claims and Demands which he or the Dutchess then had, or hereafter should have, by reason of any Moneys or Personal Estate by her receiv'd as Guardian to her Daughter, or for any other matter or thing in Right of her, and of all other matters whatsoever, and that there had been Suits between the Respondents and the said Lady *Gerrard*, concerning the same, and that as he believes the Testator intended by the said Proviso, that the same should be Release'd.

Dated 15 July, 1698.
27 Jan. 1702. The Cause being Heard on Bill and Answer, the Court Decreed that the Respondent the Dutchess should not give the Appellant any Trouble, as he is Executor of the said Earl, and that the Appellant should bring the said Jewels before a Master to be Valu'd, and upon the Respondents giving Security to the Value, not to Trouble the Appellant as Executor to the said Earl, the Jewels to be deliver'd to the Respondents.

Now however hard the Respondents might think it upon them, to be obliged to give such Security, yet they being out of the Kingdom for the most Part of the Time since, have not yet complain'd thereof, but offer'd to give such Security, which hath been declin'd by the Appellant, who by his Appeal seeks to reverse or alter the said Decree, for that, as he insists, he ought to have had a Release Decreed to him thereby: or at least that the Respondents ought to have been Decreed to give Security that they or either of them should not Sue or Trouble any Person whatsoever, who should represent the Earl or the said Lady, as an Executor or an Administrator, with her Will Annexed, and that Security may be provided to extinguish the Respondents Demands according to the said Covenant.

But the Respondents humbly Pray that the said Appeal may be Dismissed; For that neither at Law, or in Equity, are there any Proofs to be Admitted of the Meaning of the said Will, but what do arise upon the Words and Expressions thereof, which do not in the least Mention any such Release; nor is it reasonable to be thought the Earl intended it for that.

Ist. The Legacy seems to be of Kindness to the Dutchess, and was Part of her own Mothers Jewels, some of which were bought with the Reins of her own Estate, during her Minority; and the Value of the Jewels are computed to be about 1200 £. in lieu of which, the Appellant would have to be Released above the Value of 15000 £.

II^{dy}. The Appellant would have the Release Extend to the Duke, who is not Mentioned in the Will, and thereby the Kindness intend'd by the Will only to the Dutchess, would be put entirely in the Power of the Duke, whether he would or would not give such Release: Nor could he mean the Dutchess to Release; for it was not in her Power.

III^{dy}. Not only is the Law and Equity against such Foreign Constructions and Intendments of Wills, beyond the Words or Expressions thereof, but in this Case ought not to be Strained or Extended towards such Release; for that the Covenant insist'd upon to give the same, was very unduly procured by the Lady *Gerrard*, when she was Guardian of her Daughter under Age, and impos'd upon the Respondents after a Marriage-Treaty of Two Years, and the Articles of Settlement of the Dutchess's own Estate, and of her Jointure *Pinmony*, a Settlement of the Duke's Estate on her and Issue, all fairly Agreed; and which hath been all since executed and performed by both the Respondents; but the said Agreement for the Release was not insist'd on till a few Days before the Marriage, when the Respondents were so engaged to each other, that they could not on any Account brake off the Treaty; and then the Lady *Gerrard* got Inserted a Recital towards the Duke's Covenant, as if the same had been on a full and fair Account; and as if the Respondents had been fully satisfy'd therewith: Whereas in truth, the Dutchess's Father Dying when she was about Four Years Old, the Lady *Gerrard* for about Fifteen Years received all the Profits of her Estate of great Value as her Guardian; and also all the Personal Estate of her Father, and never made any Account thereof; and the Dutchess immediately after the Marriage, expressing her self dissatisfied with the said Proceedings, and acquainting the Duke how many ways she had been impos'd upon to seem to make things her desire, which in truth were not so; the Duke therefore at the Dutchess's Request (whose Interest it was) desired time to Execute such Release, till the Dutchess should be of Age; and thereupon was Arrested and held to Bail in an Action at Law of 10000 £. on a Bond for Performance of the said Covenant, and thereby was forced to bring a Bill in *Chancery* to be relieved against the same, as very unduly obtain'd and impos'd upon the Respondents, and upon no Account made of so great and just Demands, or the least Considerations paid by the Lady *Gerrard*, but taking Advantage of their mutual Engagements as aforesaid; and the Lady *Gerrard* having Answered, and Witnesses Examined on each sides, she Dyed when the Cause was ready to be Heard.

IV^{ly}. The Respondents said Demand against the Lady *Gerrard*, did not affect the said Earl; in his own Right and it should seem far more reasonable to Construe the said Proviso, that the Dutchess should not trouble or hinder his Executor in the Probale of his Will, concerning which, his Brother *Fitton* late Earl of *Macklesfield* did Commence a Suit and opposed the same; but she did not joyn therein to trouble the Appellant; or that the Proviso is void for its being uncertain or insensible, than either to avoid the Legacy or extend the Construction to such a Release procured by a Guardian by such undue Means as aforesaid; and when the said Matters being well known to the said Earl if he had so meant, he would have express'd the same accordingly, and thereby Enjoyed the Duke to have done the same.

Besides, How far a Suit for a just Debt or Demand ought in any Legal Sense to be Construed a Trouble; which seems rather to imply some causeless Vexations: Is Humbly Submitted. And all such Proceedings of Guardians as aforesaid relating to Infants; (in which the Publick is so extremely concerned) have always been Discouraged. The Facts and Circumstances of this Case by the Proofs in the said Cause against the Lady *Gerrard*, appearing to be as aforesaid.

JAMES SLOANE.